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92-1239
NO.

Supreme Court, U.S.
FILED
JAN 21 1993
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

Ex parte J.E.B.

(Re: J.E.B.

vs.

State of Alabama, Ex rel T.B.)

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

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61 pp

ISSUES PRESENTED FOR REVIEW

The single issue presented to this Court for review is whether a male defendant in a paternity action brought by the State of Alabama, has the right, under the Equal Protection clause of the 14th Amendment to the United States Constitution, to challenge the State's use of its peremptory jury strikes to exclude all males from the jury panel. The same question, presented in another way is whether or not peremptory jury strikes based upon a perspective juror's gender is discriminatory, such that, upon challenge by the opposing party, the procedures established by this Court in Batson vs. Kentucky, 476 U.S. 79, 90 L Ed 2nd 69, 106 S Ct 1712 (1986) would apply.

PARTIES TO THE PROCEEDING

Petitioner: James E. Bowman, Sr.

Respondent: State of Alabama, Ex rel. Teresia Bible

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CITATION OF OFFICIAL REPORT

Certiorari to the Alabama Supreme Court is sought from the following opinion:

J.E.B. vs. State of Alabama, Ex rel T.B., _____ So. 2d _____ (Ala. Civ. App., 1992), cert denied _____ So. 2d _____ (1992).

JURISDICTIONAL GROUNDS FOR PETITION

Jurisdiction for review by this Court is invoked by your Petitioner pursuant to 28 USC §1257(3). The holding of the Circuit Court of Jackson County, Alabama, as affirmed by the Alabama Court of Civil Appeals, with certiorari denied by the Alabama Supreme Court, denies the Petitioner his rights to the Equal Protection of the laws under the 14th Amendment to the United States Constitution. In holding that the Petitioner did not have the right to invoke the procedures set out by this Court in Batson vs. Kentucky, 476 U.S. 79, 90 L Ed 2nd 69, 106 S Ct 1712 (1986), on his challenge to the use of the State's peremptory jury strikes based solely upon gender, the State Court's decisions conflict with the 9th Circuit Court of Appeals decision in U. S. vs. De Gross, 913 F. 2d 1417 (9th Cir. 1990).

STATEMENT OF THE CASE

This action is a paternity case originating in the Circuit Court of Jackson County, Alabama upon the Petition of the State of Alabama, ex rel T.B , alleging that J.E.B. was the father of a child born to T.B. The matter was called for trial on October 21, 1991 and the Court proceeded to empanel a jury. After voir dire by the Court and all parties, the jury was struck. Before the jury was empaneled, your Petitioner challenged the State's use of its peremptory strikes to eliminate all of the male jurors from the panel based solely upon their gender, in violation of the Equal Protection clause of the 14th Amendment to the United States Constitution. In making such objection, your Petitioner was requesting the Trial Court to conduct a proceeding to determine the discriminatory nature of the State's use of its peremptory strikes. The Court overruled your Petitioner's objection and denied its

request to follow the procedures established by this Court in Batson vs. Kentucky, 476 U.S. 79, 90 L Ed 2nd 69, 106 S Ct 1712 (1986).

Specifically, prior to the jury being empaneled, your Petitioner made the following challenge to the State's strikes:

MR. PORTER: Judge, before the jury is empaneled, I propose to the Court that I do not know the appropriate method to do this, we would challenge the State's strikes on the *Batson* decision and other decisions that have followed that I have heard and understand that gender based strikes based upon gender are just as [in]valid on race strikes based upon the race--the State strikes with the exception of one were males. Virtually none of them answered any questions whatsoever which would show prejudice or bias in any way, and I submit to the Court that they were basically struck solely upon gender.

THE COURT: You're talking about gender strikes?

MR. PORTER: Yes, sir. Gender strikes. Again, I propose to the Court that I don't know exactly how to do this. I have never done it especially on gender.

THE COURT: You are not raising a race question? I am going to deny your motion--your challenges--on the jury that's been empaneled on the basis of gender strikes.

MR. PORTER: We would also point out to the Court that the venire is made up of approximately seventy-five percent women, which also adds to the fact that he has struck all but one of the men.

THE COURT: For the record, I will relate that there were 62 jurors on this morning's voir dire, and I did not need all 62 so I instructed the Clerk to take every other name until we got 36. That's the way these people wound up where they are. I overrule your objection and deny your motion.

(A jury was sworn and empaneled.)

(Reporter's Transcript Page 37)

Thereafter, a jury consisting of 12 females was empaneled and the case proceeded to trial. Numerous objections and challenges to the State's expert witness were made and each in turn, overruled by the Court. At the conclusion of the trial, the jury found and determined J.E.B. to be the

father of the child, and the Court entered judgment thereon.

Your Petitioner subsequently filed a Post-Judgment Motion requesting an Order of Judgment Notwithstanding the Verdict, or in the alternative, a New Trial. As a portion of the grounds for such Post-Judgment Motion, your Petitioner again raised the defendant's right to Equal Protection of the law as guaranteed by the United States Constitution. Your Petitioner challenged the State's use of its peremptory strikes to strike all the males from the jury panel. Your Petitioner further challenged the Court's failure to require the State to articulate a nondiscriminatory reason for challenging the jurors, in accordance with the procedures established by this Court in Batson vs. Kentucky, 476 U.S. 79, 90 L Ed 2nd 69, 106 S Ct 1712 (1986). In denying your Petitioner's Post-Judgment Motion, the Trial Court specifically held "that the *Batson* doctrine does not extend to gender

based strikes".

Thereafter, on January 24, 1992, your Petitioner gave Notice of Appeal to the Alabama Court of Civil Appeals from the Court's Orders establishing paternity. Your Petitioner submitted the following issue to the Alabama Court of Civil Appeals:

> "The Trial Court erred in failing to allow the Appellant to challenge the State's peremptory jury challenges based solely upon gender in violation of his rights to equal protection of the law."

In affirming the Trial Court's holding, the Court of Civil Appeals opined that the Alabama Supreme Court had "declined to extend the Batson principle to gender based strikes", based upon the decision of Murphy vs. State, 596 So. 2d 42 (Ala Crim App, 1991), cert denied 596 So. 2d 45 (1991). Thereafter, on July 17, 1992, the Alabama Court of Civil Appeals denied your Petitioner's Application for Rehearing.

On July 31, 1992, your Petitioner filed his Petition for Writ of Certiorari to the

Court of Civil Appeals, in the State of Alabama Supreme Court. Your Petitioner again presented the issue of gender based jury strikes to the Court and specifically stated as follows:

> "The Petitioner seeks to have this Court reconsider and overrule the majority opinion in Murphy vs. State, 596 So. 2d 42 (Ala Civ App, 1991), cert denied 596 So. 2d 45 (1991), and to adopt as the majority opinion the reasoning issued by Justice Maddox in his dissent which strikes down jury based peremptory jury challenges."

On October 23, 1992 the Alabama Supreme Court denied your Petitioner's Writ of Certiorari to the Alabama Court of Civil Appeals.

This Petition for Writ of Certiorari is now presented to this Court.

ARGUMENT

The single issue presented to this Court for review is whether a male defendant in a paternity action brought by the State of Alabama, has the right, under the Equal Protection clause of the 14th Amendment to the United States Constitution, to challenge the State's use of its peremptory jury strikes to exclude all males from the jury panel. The same question, presented in another way is whether or not peremptory jury strikes based upon a perspective juror's gender is discriminatory, such that, upon challenge by the opposing party, the procedures established by this Court in Batson vs. Kentucky, 476 U.S. 79, 90 L Ed 2nd 69, 106 S Ct 1712 (1986) would apply.

The United States Court of Appeals, Ninth Circuit in the decision of United States vs. De Gross, 913 F. 2d 1417 (9th Cir 1990), was presented the same issue for review. They stated the question as "whether the principles established in

Batson compel us to prohibit the exercise of peremptory challenges on the basis of the venire persons gender. 913 F. 2d at 1421. That Court concisely held that "Equal Protection principles prohibit peremptory challenges exercised on the basis of venire persons gender". 913 F. 2d at 1423. In a well reasoned opinion, that Court concluded that the "mere existence of discriminatory practices in jury selection 'casts doubt on the integrity of the whole judicial process'" 913 F. 2d at 1421, citing Peters vs. Kiff, 407 US 493, 502-503, 92 S Ct 2163, 2168-69, 33 L Ed 2d 83 (1972). In reviewing the *Batson* principles as they might apply to gender based discriminatory peremptory challenges, the Court reviewed the differences between racially based discrimination and gender based discrimination. After an extensive review the Court determined that gender based discrimination in the use of peremptory jury challenges was not "substantially related to

achieve an important governmental interest" and, therefore, were prohibited by the Equal Protection principles of the United States Constitution. The Court found that gender based discrimination has the same adverse effects upon the jury selection process as does racially based discriminatory challenges. Neither a persons race nor their gender should automatically exclude that person from serving upon a jury panel. Neither form of discrimination can be tolerated when a fair and open judicial process is the object sought to be achieved.

The Ninth Circuit revisited the same question in Diaz vs. Sky Chiefs, Inc., 948 F. 2d 532 (9th Cir, 1991). Upon further review after remand for reconsideration by this Court, Sky Chiefs, Inc. vs. Diaz ____ U.S. _____, 111 S Ct 2791, 115 L Ed 2d 965 (1991), the Ninth Circuit refused the relief sought because the Petitioner's objection to the jury selection process was held to be untimely. Such is not the case in the

Petition presently before the Court. Your Petitioner made an objection and challenge to the use of the State's peremptory challenges to exclude the males from the jury, at the earliest possible moment. The challenge was made after the striking process was finished but before the jury was empaneled and the remainder of the venire discharged. Under the Alabama jury selection process, a panel of prospective jurors (in this case a panel of 36) is presented to both counsel. In both civil and criminal cases, each side is then allowed to strike jurors from the list, alternating between them, until the panel of 12 jurors remains. Therefore, the first reasonable opportunity to raise an objection to an opponent's use of their peremptory strikes is after the jury is struck and before it is empaneled.

In this paternity action, the Respondent herein was represented by counsel for the State of Alabama. A panel of 36

jurors was presented by the Court as a prospective jury panel. Of that panel, 24 were females and 12 were males. Three of these jurors were struck for cause, being two males and one female, thereby leaving a panel of 33 jurors consisting of ten males and 23 females. The State was allowed ten peremptory strikes, exercising nine of them to strike male jurors. Such use of peremptory challenges by the State resulted in a jury consisting of all females.

After the jury was struck but before it was empaneled by the Court, your Petitioner challenged the State's use of gender based strikes, encompassing the principles set out by the Supreme Court of the United States in Batson vs. Kentucky, 476 U. S. 79, 90 L Ed 2d 69, 106 S Ct 1712 (1986). The Court denied your Petitioner's objection or challenge to the State's use of preemptory strikes to exclude virtually all the males from the jury.

Such issue was again raised by your

Petitioner in its Post Trial Motion. The Appellant objected to the State's use of its peremptory strikes based upon gender, upon the grounds that such use of its peremptory strikes violated the Appellant's right to Equal Protection of the law as guaranteed by the 14th Amendment of the United States Constitution and the Constitution of the State of Alabama and also his due process rights. The Trial Court ruled in denying your Petitioner's Post Trial Motion that the "Batson doctrine does not extend to gender based strikes".

Beginning with the Batson vs. Kentucky decision, this Court established the principle that discriminatory based peremptory jury strikes violate the Equal Protection provisions of the 14th Amendment to the United States Constitution. This prohibition has been extended to both criminal trials and civil trials. Emondson vs. Leesville Concrete Co., _____ U.S. _____, 111 L Ed 2d 660, 111 S Ct 2077

(1991); Fludd vs. Dykes, 863 F. 2nd 822 (11th Cir.), cert. denied, 110 S. Ct. 201 (1989); Thomas vs. Diversified Contractors, Inc., 551 So. 2nd 343 (Ala. 1989).

The Petitioner's challenge and objection to the State's use of its peremptory strikes is based upon the premise that the use of peremptory strikes solely upon a person's gender are prohibited by the Equal Protection clause of the 14th Amendment to the United States Constitution. Such rights are designed to assure the party to a criminal trial or civil litigation that the trial will be fair and impartial. In this case, the issue was placed squarely upon the shoulders of the trial judge for his determination and the same was rejected.

The issue of whether or not gender based strikes are prohibited has been addressed by the Appellate Courts of Alabama with results which conflict with the Ninth Circuit's opinion in De Gross. The majority opinion of the Court of Criminal Appeals and

the Supreme Court at this time reflects that gender based strikes are not prohibited by the principles set out in Batson vs. Kentucky. Murphy vs. State, 596 So. 2d 42 (Ala. Civ. App., 1991) cert denied, 596 So. 2d 45; Fisher vs. State, 587 So. 2nd 1027 (Ala. Crim. App. 1991), writ denied, 587 So. 2nd 1039 (Ala. 1991); Daniels vs. State, 581 So. 2nd 563 (Ala. Crim. App. 1990), writ denied, 581 So. 2nd 541 (Ala. 1991); Dysart vs. State, 581 So. 2nd 541 (Ala. Crim. App. 1990), cert denied, 581 So. 2nd 545 (Ala. 1991); Stariks vs. State, 572 So. 2nd 1301 (Ala. Crim. App. 1990).

The above decisions notwithstanding, there has been a strong dissent adopted by a minority of both the Court of Criminal Appeals and the Supreme Court which would extend the Batson principles to gender based strikes. In Ex parte Murphy, Supreme Court Justice Maddox offered a very strong dissent in which he was joined by Justice Adams and Justice Ingram. 596 So. 2d 45. In the same

case, Justice Bowan issued a dissenting opinion for the Court of Criminal Appeals. 596 So. 2d 44.

The exclusion of any particular group, i.e., males, from potential jury service in any case limits the community's participation in the judicial system. A paternity action is particularly sensitive to the discriminatory use of peremptory challenges to exclude males from the jury. Criminal trials and civil litigation are basically race neutral. Persons of all races may become both plaintiffs and defendants in civil actions. Yet, this Court has determined that no one may be excluded from jury service because of their race. Likewise, civil litigation is primarily gender neutral. Even sexual harassment cases may be brought by males against females, and vice versa. However, a paternity action particularly pits the female against the male, thereby establishing the man as the defendant in

such an action. Therefore, in the case at bar, the Petitioner's right to have males not to be excluded from the jury is particularly sensitive.

Once having made the challenge to the State's use of its peremptory strike to exclude the males from the jury, the Trial Court should be bound to follow the procedures set out in Batson. In the matter currently before the Court, the Trial Court determined that the Batson principles were not applicable to gender based strikes and that no such proceeding was required. The objection having been made, the Court should have inquired as to whether the State had used its peremptory strikes in a discriminatory manner. The failure of the Trial Court to follow the Batson procedure, violated your Petitioner's right to the Equal Protection of the law under the 14th Amendment to the United States Constitution and constituted a reversible error.

CONCLUSION AND PRAYER FOR RELIEF

Your Petitioner prays that this Court will grant this Petition for Writ of Certiorari to the Supreme Court of the State of Alabama and upon a full review will remand the same with instructions for compliance with the proceedings set out in Batson vs. Kentucky.

LIVINGSTON, PORTER & PAULK, P.C.

John F. Porter, III
Counsel for Petitioner
P. O. Box 1108
Scottsboro, Alabama 35768
Phone: (205) 259-1919

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon James H. Evans, Attorney General, Room 303, 11 S. Union Street, Montgomery, Alabama 36130, by placing the same in the United States mail, first class certified postage prepaid and properly addressed.

Done this 20 day of January, 1993.

John F. Potter, III

APPENDIX

I. Excerpts of Official Record on Appeal (Cover Sheet and Pages 35, 36 and 37)..... A-1

II. Post Judgment Motion..... A-6

III. Order on Post Judgment Motion.. A-14

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STATE OF ALABAMA
IN THE CIRCUIT COURT
FOR THE COUNTY OF JACKSON
THIRTY-EIGHTH JUDICIAL CIRCUIT
CIVIL

STATE OF ALABAMA, ex rel
TERESIA BIBLE,
PLAINTIFF,
VS. CIVIL ACTION NO.:
JAMES E. BOWMAN, SR., CV-90-314
DEFENDANT /

REPORTER'S OFFICIAL TRANSCRIPT ON APPEAL

Before:

Hon. Robert L. Hodges and a jury
Scottsboro, Alabama - Monday,
October 21, 1991.

APPEARANCES:

For the Plaintiff:

William W. Tally
Assistant District Attorney

For the Defendant:

John F. Porter
Attorney at Law

Celeste O. Arnold, RPR, CSR
Official Court Reporter

(Jury struck.)

(Side-bar conference, outside jury's hearing.)

MR. PORTER: Judge, before the jury is impaneled, I propose to the court that I do not know the appropriate method to do this, we would challenge the state's strikes on the Batson decision and other decisions that have followed that I have heard and understand that gender

based strikes based upon gender are just as valid as race strikes based on the race -- the state's strikes with the exception of one were males. Virtually none of them answered any questions whatsoever which would show prejudice or bias in any way, and I submit to the court that they were basically struck solely upon gender.

THE COURT: You are talking about gender strikes?

MR. PORTER: Yes, sir. Gender strikes. Again, I propose to the court I don't know exactly how to do this. I have never done it especially on gender.

THE COURT: You are not raising a race question? I am going to deny your motion--your challenges--on the jury that's been impaneled on the basis of gender strikes.

MR. PORTER: We would also point out to the

court the venire is made up of approximately 75 percent women, which also adds to the fact that he has struck all but one of the men.

THE COURT: For the record, I will relate that there were 62 jurors on this morning's voir dire, and I did not need all 62 so I instructed the clerk to take every other name until we got 36. That's the way these people wound up where they are. I overrule your objection and deny your motion.

(A jury was sworn and impaneled.)

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT
ex rel.,TERESIA	)	FOR JACKSON COUNTY
BIBLE	)	ALABAMA
PLAINTIFF	)	CASE NO.:
VS.	)	CV-90-314
JAMES EDWARD	)	
BOWMAN	)	
DEFENDANT	)	

POST-JUDGMENT MOTION

NOW COMES the defendant herein and pursuant to Rule 50 of the Alabama Rules of Civil Procedure, does hereby move this Court for entry of an Order of Judgment Notwithstanding the Verdict or in the alternative, pursuant to Rule 59 of the Alabama Rules of Civil Procedure, does hereby move this Court for a new trial or in the alternative to alter, amend or vacate the Judgment entered by this Court on the 23rd day of October, 1991 and the Order of Support dated November 8, 1991 and in support thereof does hereby say as follows:

1. The verdict of the jury and judgment entered thereon is against the great weight of the evidence.

2. The verdict of the jury and the judgment entered thereon is contrary to Alabama law and the facts presented to the Court.

3. The Court erred in denying the defendant's objection to the State's unconstitutional, gender based peremptory jury challenges.

4. The verdict of the jury and the judgment entered thereon is void in that the defendant's fifth amendment right to equal protection of the law was violated by the State's exercising its peremptory jury challenges based solely upon gender.

5. The jury as impaneled containing all females, violated the

defendant's right to equal protection of the law as guaranteed by the Fifth Amendment of the United States Constitution.

6. The State's use of peremptory jury challenges, eliminating all males from the jury, violated the defendant's Fifth Amendment right to equal protection of the laws.

7. After the defendant's objection to the State's use of peremptory strikes exercised against male members of the jury, the State failed to articulate a nondiscriminatory reason for challenging the jurors related to the particular case to be tried.

8. The Court erred in failing to require the State to articulate a nondiscriminatory reason for challenging the jurors related to this particular case.

9. The Court erred in allowing the State's witness to testify regarding the results of paternity blood tests without

first laying the proper predicate.

10. The Court erred in allowing the State's witness to testify regarding the "composite" paternity blood test results, without first laying the proper predicate.

11. The Court erred in allowing the State's witness to testify regarding the "composite" blood test results, without first establishing a scientifically reliable basis for such composite results.

12. The Court erred in allowing the State's witness to testify regarding the use of a DNA Test without first determining the admissability of such tests in accordance with the holding of the Supreme Court of the State of Alabama found in ex parte Waylon Dwight Perry _____ So. 2d _____ 1991, 89-1534).

13. The Court erred in allowing the State's witness to testify regarding the results of the paternity blood test without first establishing that such tests were generally accepted in the scientific community.

14. The Court erred in allowing the State's witness to testify regarding the results of paternity blood tests without requiring the State to first establish that the techniques used for such tests were capable of producing reliable results and that they are generally accepted in the scientific community.

15. The Court erred in allowing the State's witness to testify regarding the results of paternity blood tests without first establishing the testing laboratory performed generally accepted scientific techniques without error in the performance or interpretation of the tests.

16. The Court erred in allowing the

State's witness to testify regarding paternity blood testing without first establishing the minimal foundation of predicate including the establishment of a chain of identification from the time blood samples were taken to the time the samples were analyzed, by first hand knowledge of the witness.

17. The Court erred in sustaining the State's objection to the defendant's testimony regarding his impotency or sterility.

18. The Court erred in denying the defendant's motion for directed verdict at the close of the State's evidence.

19. The Court erred in denying the defendant's motion to exclude the State's evidence, or portions thereof, at the close of the State's case.

20. The Court erred in denying the defendant's motion for directed verdict at the close of all the evidence.

21. The Court erred in denying the defendant's motion to exclude the State's evidence, or portions thereof, made at the close of all the evidence.

WHEREFORE, the defendant does hereby pray that this Court will enter an Order of Judgment Notwithstanding the Verdict in the defendant's favor on all issues, or in the alternative to grant to the defendant a new trial on all issues or to alter, amend or vacate the Judgment in accordance with this Motion.

LIVINGSTON, PORTER & PAULK, P.C.

/S/
John F. Porter, III
Attorney for Defendant
P. O. Box 1108
Scottsboro, Alabama 35768
Phone: (205) 259-1919

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Post-Judgment Motion upon William W. Tally, Esq., P. O. Box 923, Scottsboro, Alabama 35768, by placing the same in the United States mail, first class postage prepaid and properly addressed.

Done this 23 day of November, 1991.

/S/
John F. Porter, III

FILED IN OFFICE
THIS DATE

91 NOV 23 PM 1 13

LEONARD V. GRIGGS
CIRCUIT COURT CLERK

THIRTY-EIGHTH JUDICIAL CIRCUIT OF ALABAMA

IN THE CIRCUIT COURT OF

JACKSON COUNTY, ALABAMA

STATE OF ALABAMA, ex rel., TERESIA BIBLE, PLAINTIFF	)	
VS.	)	CIVIL ACTION NO.
JAMES EDWARD BOWMAN, DEFENDANT	)	CV-91-314

ORDER ON RULE 59 MOTION

This court has reviewed the motion of the defendant under Rule 59 and has reviewed the voir dire conducted on trial of this cause, and the affidavit of counsel for the defendant reflecting the manner in which the jury was impanelled.

The argument of the defendant that he was entitled to have the jury venire quashed in that it was improper of the court to overrule his Batson challenge on the basis

of gender exclusion is not well taken. Defendant cites the United States Court of Appeals Ninth Circuit case of U. S. V. DeGross, 913 Fed. 2d 1417 (1990), and contends that it is authority for applying Batson v. Kentucky, 90 L.Ed 2d 69 (1986) to gender discrimination. At trial, the court denied the defendant's Batson challenge and did not require the state's attorney to explain his peremptory challenges of male jurors. It is uncontradicted that there were twelve male persons in a jury venire of thirty-six. Two of those jurors were excused for cause by the court, and they were Randall Sullivan, Dennis Young, and Brenda Sealey, contrary to the affidavit of defendant's counsel which identifies David Cooper as one of the jurors which were removed for cause by the court. Nevertheless, of the remaining thirty-three jurors, ten were male jurors. The defendant was allowed eleven peremptory challenges, and the state was allowed ten peremptory

challenges. Nine of the state's peremptory challenges were exercised as to male jurors, and one of the defendant's peremptory challenges was exercised as to a male juror. The resulting jury which was impaneled for the trial and which heard the evidence consisted of all females. The Ninth Circuit Court of Appeals opinion to the contrary, this court is of the opinion that the correct law in this state is as announced by the Alabama Court of Criminal Appeals in Murphy v. State, _____ So. 2d _____ (Court of Criminal Appeals _____ October 11, 1991). In that case it was held that the Batson doctrine does not extend to gender-based strikes.

Another argument of the defendant is that testimony of Dr.

Leigh Ann Harmon was improperly admitted to express opinions regarding "composite" paternity blood test results without a proper predicate being laid. The court has examined the witness's testimony and, first of all, is of the opinion that the DNA test involved as one of the three tests made under the supervision of the witness was not the same test in which the Supreme Court of Alabama addressed its six point review test in the Ex Parte Perry case. The witness explained that the DNA paternity test is "entirely different" from the DNA forensic test which the Supreme Court of Alabama in the Perry case addressed. Transcript, page R-56, 57. The court is of the opinion that the proper predicate was laid for the opinion being expressed by the witness, and that any objection to that opinion goes to the weight of the witness's opinion and not to its admissibility.

The defendant argues that the chain of custody of the blood samples which were tested was not sufficiently shown as a predicate in order to permit test results to be given in evidence. It is the opinion of the court, upon review of the testimony, that the test samples were taken in the manner contemplated by the statute, §26-17-12, Code of Alabama, 1975, as amended. In the opinion of the court, the predicate laid by the state's direct examination of the witness met the requisite foundation outlined by the court in Lyle v. Eddy, 481 So.2d 395 (1985), and the argument of the defendant as to the chain of custody of the blood samples, under the evidence adduced, including the photographs and the fingerprints of the parties from whom the samples were taken, goes to the weight of the evidence and not to its admissibility. There was first hand testimony from more than one witness that blood samples were taken from the mother, the child, and the

defendant by a phlebotomist, the date they were taken, that the phlebotomist identified each sample with the photograph of each party and the fingerprints of each party, initialed each vial in which the samples were placed, sealed, by identification, and transmitted them to the witness Harmon, and that the chain of custody was documented on a form of the laboratory, that the blood samples were received by the witness into the laboratory, checked for sign of tampering, and that there was no sign of tampering, and the witness identified the defendant and the mother of the child as two persons shown in the photographs. (Transcript, pages R-41 - R-53) The mother testified that the samples were taken by the laboratory-employed phlebotomist identified by the witness Harmon, that the samples were signed, photographs of each party were taken, and the thumb prints were taken, and the defendant himself acknowledged that his blood sample was taken by the phlebotomist

on the same date, that his photograph was the one attached to the sample, and that his signature appeared under the thumb print. The court is of the opinion that the objection of defendant to the chain of custody goes to the weight of the evidence and not to its admissibility. The other grounds of the defendant's Rule 59 motion have been

examined are equally without merit.

ACCORDINGLY, IT IS ORDERED AND ADJUDGED:

1. That the Rule 59 motion of the defendant for new trial, or, in the alternative, for a judgment not withstanding the verdict, or to alter, amend or vacate the judgment, is denied.

ORDERED this the 6th day of January, 1992.

/s/
Robert L. Hodges, Circuit Judge

William Tally, Assistant District Attorney
John Porter, III, Attorney

FILED IN OFFICE
THIS DATE

92 JAN 06 PM 2 08

LEONARD V. GRIGGS
CIRCUIT COURT CLERK

JUN 05 1992

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STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE COURT OF CIVIL APPEALS

OCTOBER TERM 1991-92

2910210

J.E.B.

v.

State of Alabama ex rel T.B.

Appeal from Jackson Circuit Court

(CV-91-314)

WRIGHT, Retired Appellate Judge

The State of Alabama, on behalf of T.B. (mother), filed a complaint for paternity

and child support against J.E.B. (father) in the District Court of Jackson County. After a hearing the district court entered an order adjudicating paternity and ordered the father to pay child support. The father filed notice of appeal to the circuit court. A jury trial was held.

The jury returned a verdict in favor of the mother. The trial court entered an order accordingly. The father appeals.

Initially the father asserts that the trial court erred in overruling the father's objection to the State's peremptory jury strikes based on his allegation that the State's strikes were based entirely on gender.

The father insists that the State improperly used its peremptory strikes to purposefully eliminate men from the jury. He suggests that such actions were in violation of his rights to equal protection and due process. He requests that this court extend the Batson v. Kentucky, 476 U.S. 79 (1986), principle, which prohibits peremptory strikes based solely upon race, to include gender-based strikes.

This issue has previously been addressed by the court of criminal appeals and the supreme court. Fisher v. State, 587

So. 2d 1027 (Ala. Crim. App.), cert. denied 587 So. 2d 1039 (Ala. 1991); Daniels v. State, 581 So. 2d 536 (Ala. Crim. App. 1990), cert. denied 581 So. 2d 541 (Ala. 1991); Dysart v. State, 581 So. 2d 541 (Ala. Crim. App. 1990), cert. denied 581 So. 2d 545 (Ala. 1991). The supreme court recently revisited the issue in Ex parte Murphy, [Ms. March 20, 1992]

____ So. 2d ____ (Ala. 1992), and declined to extend the Batson principle to gender-based strikes. We must follow the decisions of the supreme court. § 12-3-16, Code 1975.

The father next contends that the blood test results should have been excluded because the State failed to establish a proper chain of custody. He specifically asserts that the phlebotomist's failure to testify was fatal to the admissibility of the blood test results.

Dr. Leigh Ann Harmon, the supervisor of the University of Alabama at Birmingham Immunogenetics/DNA Diagnostic Laboratory, testified that along with the blood samples she received an Immunogenetics/DNA Diagnostic Laboratory Paternity Chain of Custody Document. The document was developed in order to allow the supervisor to confirm the chain of custody without having to bring numerous laboratory personnel to court. Dr. Harman thoroughly

discussed the document and its safety devices. She testified in detail as to her laboratory's procedures for drawing blood samples and assuring proper identification of both the individuals having the test and the blood samples drawn from those individuals. She testified that once the blood samples

were received by the laboratory they were checked for any sign of tampering. She stated that there was no sign of tampering, that the box was taped, the tape was intact, and the tape was initialed by the person who sealed and delivered it.

We find that a proper chain of custody was sufficiently established by Dr. Harman's testimony. Lyle v. Eddy, 481 So. 2d 395 (Ala. Civ. App. 1985).

The father asserts that the trial court erred in allowing into evidence the results of the DNA test without first establishing that the test "met the requirements of the recent supreme court holding in the case of Ex parte Perry, 586 So. 2d 242 (Ala. 1991)."

Ex parte Perry pertains to the admissibility of DNA test results in a forensic setting. That case clearly distinguishes between forensic testing and clinical testing (which we have in this case). The strict admissibility

requirements of Ex parte Perry are not applicable in a paternity action.

The judgment of the trial court is affirmed.

The foregoing opinion was prepared by Retired Appellate Judge L. Charles Wright while serving on active duty status as a judge of this court under the

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provisions of § 12-18-10(e), Code 1975, and this opinion is hereby adopted as that of the court.

AFFIRMED.

All the judges concur.

John H. Wilkerson, Jr. Clerk, Court of Civil Appeals of Alabama do hereby certify that the foregoing is a full and correct copy of the instrument(s) herewith set out as the same appears of record in said court. Witness my hand this 5th day of June, 1992.

/s/ John H. Wilkerson, Jr.

Clerk, Court of Civil Appeals of Alabama

OFFICE OF

CLERK OF THE COURT OF CIVIL APPEALS

STATE OF ALABAMA

MONTGOMERY

CV 91-314

Re: CIV. 2910210 July 17, 1992

J.E.B. vs. STATE OF ALABAMA, ex rel T.B.

Appellant Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Court of Civil Appeals:

___ Court reporter granted additional time to file reporter's transcript to and including

___ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

___ Appell____ granted 7 additional days to file brief(s) to and including

___ Appellant(s) granted 7 additional days to file reply brief(s) to and including

___ Record on Appeal filed on this date.

___ Appendix Filed on this date.

___ Submitted on Briefs

XXX Application for rehearing overruled. No opinion written on rehearing.

___ Permission to file amicus curiae briefs granted.

___ Rules suspended

___ Transferred to the Supreme Court for lack of jurisdiction. A/N

/s/ John H. Wilkerson, Jr.

Clerk, Court of Civil Appeals of Alabama

MAILING ADDRESS:

2600 East South Boulevard, Room 250

Montgomery, Alabama 36116

THE STATE OF ALABAMA -- JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

October 23, 1992

1911717

Ex parte J.E.B.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS

(Re: J.E.B. v. State of Alabama, ex rel. T.B.)

(CIV 2910210 (Jackson CV-91-314))

CERTIFICATE OF JUDGMENT

Writ Denied

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The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

KENNEDY, J. - Hornsby, CJ., Maddox, Shores and Houston, JJ., concur.

Robert G. Esdale, Clerk, Supreme Court of Alabama do hereby certify that the foregoing is a full, true

and correct copy of the instrument(s) herewith set out as same appears of record in said court. Witness my hand this 23 day of Oct. 1992.

/s/ Robert G. Esdale

Clerk, Supreme Court of Alabama